No. 80-323

IN THE

Supreme Court of the United States

October Term, 1980

COLUMBIA BROADCASTING SYSTEM, INC.,

Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Defendants' briefs in opposition and the CBS petition are, in the main, ships passing in the night. That is so because defendants cannot and will not deal head on with the radical error of law made by the court of appeals' decision or its conflict with the decision of this Court.

1. As to the error, defendants, throughout their briefs, address a non-issue.

The determinative issue in this case is *not* whether CBS is restrained from engaging in direct dealings with individual sellers.

The determinative issue is whether *competition* is restrained by individual sellers agreeing on the prices they should charge, whether CBS engages in direct dealings or doesn't.

Defendants recognize (by lip service) that this is the issue, but then assume, as did the court of appeals—and equally without supporting analysis or authority—that

competition could not possibly be restrained if CBS engaged in direct dealings (*e.g.*, ASCAP Br. 7-8; BMI Br. 9-10).

But this makes no sense. The common Sherman Act, Section 1 price conspiracy case involves sellers dealing directly with buyers. The reason for illegality in such cases is that some agreement or understanding among sellers limits the degree to which the sellers compete on a price basis—and thus injures the buyer and the public generally by inflating prices above those that would be arrived at in a truly competitive market.

So here.

The practice complained of is that a nationwide combination of sellers (music publishing corporations and writers) agree in committee (ASCAP) on the prices they will charge buyers (television networks) for a requirements contract (the blanket license) to a pool of their products (music performance rights)—and further agree on the amounts they will distribute to themselves ($1,000-a-use) in respect of each use of their products.

The restraints on *competition* imposed by this system of collective pricing do not derive from any inability of the buyer to deal directly. They derive, at the threshold, from the fact that price competition is totally eradicated *vis-a-vis* any network licensed on a blanket basis (C33 (Stevens, J.); A10). But they *also* derive from the fact that competition would be restrained, *vis-a-vis* any directly licensing network, by the very existence of this arrangement and the continuing effects of this combination's past practices.

It is that point the court of appeals missed and defendants wish to obscure.

For example, with regard to the continuing effects of this collective's past practices: the fact that the ASCAP blanket license was, until the 1950 consent decree, the *exclusive* method of sale, means that at any time after 1950, and now, no network could cancel the blanket license without paying supracompetitive prices to use music already recorded in the soundtracks of programs and theatrical motion pictures (*see* CBS Pet. 5-6, 25-26; *see also* C38

n.31 (Stevens, J.); H17-18). As the court of appeals itself found, there can be "no meaningful price competition" on such "music-in-the-can," whether it is part of the network's existing inventory of programs and films or recorded in programming materials on which the network wishes to bid in the future (A18).

But even more fundamentally, if any single network cancelled its blanket license, it could not get (on any music) prices untainted by this arrangement. Price competition in direct licensing would be restrained by virtue of the fact that under the blanket licensing system ASCAP members agree that the price they *should* receive from television networks—and actually do receive in distributions made of the blanket fee—is $1,000-a-use. Hence, competition would be restrained here in the same sense that it is always restrained when any group of sellers, particularly those comprising virtually all of the market, agree on the price they should get (*see* CBS Pet. 22-25 & nn. 20-21).

The impact of a price literally fixed in one mode of sale on the price charged *for the same product* in another mode of sale is so obvious an economic proposition that it had been repeatedly conceded by defendants until the remand in this case (*see* CBS Pet. 23 & n.21) and, indeed, is presumed in law.

This Court has so held *a fortiori*—*e.g.*, where the fixed price was set in a vertical price maintenance arrangement, and the price presumed in law to be affected was the price charged by sellers of *other* brands who were not even members of that combination. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977), *approving White Motor Co. v. United States*, 372 U.S. 253, 268 (1963) (Brennan, J., concurring).

Here, the sellers and the products are identical. As the Department of Justice stated in its *amicus* brief to the court of appeals, the ASCAP schedule of $1,000-a-use

> "would have a direct impact on the price of compositions in a direct licensing market . . . since the product—a single composition—is the same." H23 n.19.

Defendants make no attempt to answer that point; it is, indeed, unanswerable.[1]

2. Instead, defendants seek to create the illusion that the very findings which preclude a "necessity" defense —the findings that direct licensing would be a "feasible," "convenient," and "efficient" alternative to blanket licensing (E40, 55)—would have to be overturned, along with numerous supportive, subsidiary findings, in order for the court of appeals' decision to be reversed (ASCAP Br. 7; BMI Br. 7).

But that is absurd. Those findings mean that collective pricing (the blanket license) is *unnecessary*. It is one of the major reasons why the court of appeals' decision is in conflict with the decision of this Court.

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[1] Offering no analysis of its own, BMI nevertheless points to the statement of the court of appeals in its first opinion that "the District Court found the contrary" (Br. 8, *citing* D22 n.27). The court of appeals was wrong; and BMI well knows it. There was no such finding. Had there been any such finding, BMI certainly would have cited it and quoted from it, and BMI does neither. It does not exist.

But why doesn't BMI mention its own statement to this Court that:

> "To be sure, the price of a BMI license—like any other price in a market—has an effect on what would be charged in direct licensing transactions. . . . Thus, the price of a blanket license acts as a check on direct license prices . . . ." (BMI's 1978 Cert. Pet. 15)

—or ASCAP's statement to the district court that ASCAP's $1,000-a-use schedule "*would inevitably become the focal point around which any direct licensing transactions would take place*" (ASCAP's "Comments on CBS' Latest Statement of the Elements of a Per-Use License," May 24, 1973, at 2, emphasis added).

We quoted both statements in our petition among other concessions to the same effect (Pet. 5, 23 n.21); they are direct, categorical admissions of restraint; and defendants' refusal even to mention, much less to explain, admissions that so cripple their defense of "no restraint" is plain acknowledgment that they have no explanation to offer.

The same may be said for defendants' explicit admissions of anticompetitive intent, summarized in our petition (Pet. 19 n.18, 26-27). These admissions were quite consistent with, and, in fact, reinforced, the lower court's findings regarding defendants' extreme antipathy to direct licensing, based on their desire for "bargaining clout" and their "apprehens[ion]" of "intense competition" (E60-61; *see* C37 n.30 (Stevens, J.)); but they are also nowhere referred to or explained in defendants' briefs.

For while this Court stated that the necessity, if any, of collective pricing might offset its inherent restraints (C20-23), and directed the court of appeals to inquire into that or any other justification (C25), the court of appeals held exactly the opposite: that the *lack* of necessity for collective pricing (*i.e.*, the feasibility, convenience, and efficiency of direct dealings) meant that no restraint was imposed.[2]

3. ASCAP complains that our petition "seeks to equate ASCAP with any horizontal arrangements among competitors," and that this Court held otherwise (Br. 9).

There is, of course, no such holding by this Court. The circumstances in which ASCAP is "not really" a horizontal combination, and is a "separate seller" of a "different product," exist *only* when ASCAP makes a "market in which individual composers are inherently unable to compete fully effectively" (C23 & n.19).

That condition obtains when direct dealings are substantially impracticable (as this Court assumed to be true in the radio stations market and others, C20-21, 22 n.37). But where, as here, direct dealings would be "feasible," "convenient," and "efficient" (E40, 55), ASCAP is as much "a joint sales agency offering the individual goods of many sellers" (C23)—*i.e.*, a "horizontal arrangement"—as would be any joint sales agency that

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[2] Unquestionably, those findings also mean that CBS can reject the blanket license. This, of course, would be a choice to embark upon the sort of "competitive crusade" described in Mr. Justice Stevens' opinion (C37), with all the costs and risks, and the "inevitable" delay of one year or more, depicted by the district court's findings (E42, 84; *see* C36 (Stevens, J.)) (even while that court was irrelevantly concluding that CBS had "failed to prove" some extreme propositions going far beyond the elements of its case—*e.g.*, "refusals to deal," "hold-ups," E81, 88-89).

The fact is that while direct licensing is inherently feasible, the present blanket system makes it a far more costly alternative than it should be, and imposes upon that alternative the restraints discussed above in text. As the Department of Justice later stated to the court of appeals, the existence of "a feasible alternative" does not remove "the economic barriers to direct dealing which the blanket license and its concomitant disinclination effect produce" (H17).

was suddenly thrust down in the middle of a previously functioning competitive market.

4. BMI insists (Br. 12) that the court of appeals' holding of "no restraint" does not conflict with this Court's decisions in *Catalano*, *National Society of Professional Engineers*, *Nationwide Trailer Rental System*, *National Ass'n of Real Estate Boards*, or *Masonite*,[3] with such courts of appeals' decisions as *Yarn Processing* and *Plymouth Dealers'*, or with the first court of appeals' decision in this case, because they were all *per se* cases.[4]

But the *per se* holdings in those cases resulted only after severe competitive restraints were found to exist. *See* L. Sullivan, *Antitrust* 196, 199-200, 209-10 (1977). Moreover, the restraints found in those cases were *less* direct and *less* pervasive than those involved here. That is why those findings apply *a fortiori* to the *existence* of restraints in this case (*see* CBS Pet. 21, 23 & n.20). And that conclusion follows even though the restraints involved here are not *per se* illegal. For the holding rejecting *per se* illegality here was not predicated on the absence of clear restraints but on the possibility that they might be "redeemed" by "competitive virtues" (C12) ("virtues," it should be stressed, that were ultimately not shown to exist).

5. Both ASCAP and BMI contend that their practices in this market, and thus the court of appeals' decision, are *sui generis* (ASCAP Br. 1-2, 5, 7, 8; BMI Br. 13). But that, too, is plainly untrue.

To be sure, this Court gave defendants an opportunity to argue on remand that characteristics peculiar to music performance rights might justify collective selling and

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[3] *Catalano, Inc. v. Target Sales, Inc.*, — U.S. —, 100 S. Ct. 1925 (1980) (per curiam); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Nationwide Trailer Rental System, Inc. v. United States*, 355 U.S. 10 (1957), *aff'g per curiam*, 156 F. Supp. 800 (D. Kan. 1957); *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950); *United States v. Masonite Corp.*, 316 U.S. 265 (1942).

[4] *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128 (9th Cir. 1960).

pricing in this market, as such factors presumptively justify collective selling and pricing in the radio stations market (C20-21, 22 n.37).

Defendants, however, knew better, and never made any such argument. Certainly they did not venture to contend that they would be somehow prevented from monitoring network uses of music if they were prohibited from collectively selling and pricing. The district court found to the contrary (E93 n.23). In fact, elimination of the blanket license for networks would obviate the need for the present elaborate census-monitoring of every single network use and enable the publishers (through ASCAP, the Harry Fox Agency, or other joint means) to monitor as cheaply and efficiently as they now do in respect of phonograph records and motion pictures (*see* CBS Pet. 8 n.10, 10 n.13).

Not a single contention, then, was ever advanced as to why a joint sales agency which sets the price was any more necessary or desirable for the sale of music performance rights for network use than it would be for the sale of such rights to motion picture producers or the sale to networks of synchronization rights, dramatic rights, or cameras.

More importantly, the court of appeals did not rely upon any such argument—it relied on precisely the opposite conclusion: that collective licensing was entirely unnecessary and avoidable because of the feasibility, convenience, and efficiency of direct dealings.

Not only does that conclusion make ASCAP an ordinary horizontal arrangement in this market, but since lack of necessity for collective pricing was the sole predicate for the holding of no restraint, and since this is a condition characteristic of all competitive markets, the decision is applicable on its face to any group of sellers in the United States.

6. And if there is any thought that sophisticated antitrust advisors might regard this decision as "*sui generis*," that notion is immediately dispelled by reference to *United States v. Columbia Pictures Industries, Inc.; Getty Oil Company; MCA, Inc.; Paramount Pictures Corp.; and*

Twentieth Century-Fox Film Corp., 80 Civ. 4438 (Complaint filed Aug. 4, 1980, Southern District of New York). Among other practices admittedly being committed by those defendants is the joint marketing of movies to cable television operators at prices set by their joint sales agency, Premiere. *See N. Y. Times*, Aug. 5, 1980, at 1, col. 1; *Wall Street J.*, Aug. 5, 1980, at 5, col. 1. Their defense is based primarily on this case; and, if this decision is left standing, it is not likely to be the last form of collective pricing approved by knowledgeable antitrust experts or, for that matter, endorsed by some lower courts.

7. Moreover, the court of appeals' decision, far from being "*sui generis*," undermines the entire body of law regarding price-sharing and price-suggesting arrangements, which are lesser forms of restraint than those presented here.

Recently, the Department of Justice commenced an action in the United States District Court of Wyoming, entitled *United States v. Laramie County Liquor Dealers Ass'n*, 80 Civ. 0239, *reprinted in* [Current] Trade Reg. Rep. (CCH) ¶ 45,080, No. 2789. The Government complaint alleges that a trade association of retail liquor dealers violated Section 1 of the Sherman Act by distributing lists of suggested retail prices to its members.

The central principle of that complaint is that understandings among sellers concerning the prices they *ought* to receive will necessarily affect actual sales prices. The same principle underlies the decision in *Plymouth Dealers' Ass'n v. United States*, *supra*, and the recent FTC rules against cooperative price-advertising arrangements (*see* CBS Pet. 23 n.20).

But if *ASCAP* is good law, the Government loses the *Laramie* case, all such arrangements are lawful, and the FTC rules are effectively scrapped.

Why? Because the agreement among ASCAP members to receive $1,000 for every network feature use of music is the most extreme form of price-suggestion system that could possibly be devised.

8. Finally, BMI contends that the public interest would be served by the denial of this petition (Br. 13-14),

because it would enable BMI substantially to raise the price to CBS (and, unquestionably, to other networks) of the BMI blanket license.[5]

There is no question but that both BMI and ASCAP will seek to raise the price of the blanket license exponentially over the next several years, if this petition is denied. But that is not even in the interest of the vast preponderance of their members, let alone in the interest of the advertisers and the consuming public to whom some substantial portion of these increases would be passed on.

Defendants, therefore, are in error when they suggest that only CBS would be adversely affected by the denial of this petition (ASCAP Br. 1-2, 7; *see* BMI Br. 5, 13).

For there are basically two kinds of music used on television programs—(1) music written especially for the program by a relatively small number of staff writers (who receive from $1800 to $2500 a week, or more, for so doing, *not including* the ASCAP/BMI distributions they earn weekly as their programs are aired, *see* Wright Tr. 422-23; Green Tr. 3454-56), and (2) previously published music (owned principally by such conglomerates as Gulf + Western, Warner Communications, MCA, Transamerica, EMI, Twentieth-Century Fox, and others of the top fourteen publisher groups now accounting for more than 60% of the ASCAP publisher distributions, EX's 148-50, 660; PX's 94, 416; AX 160; *see* Dean Tr. 1812; Chiantia Tr. 2856-58; *see also Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 892 (S.D.N.Y. 1948)).

Those are the people who will be served by the escalation of already supracompetitive prices.

Neither ASCAP nor BMI helps new or lesser-known writers to get jobs with program packagers, or to promote their music so that it may be publicized on phonograph records and used on television programs. That is not the function of these consortia. On the contrary, the ASCAP/BMI system manifestly worsens the writer's chances in

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[5] BMI also complains of the stay of its state court action against CBS for purported insufficiencies of fees paid prior to 1970 (*id.*). BMI, however, fails to reveal that that action has been stayed because BMI *stipulated that it be stayed* pending the final resolution of this suit.

both respects; indeed, it affirmatively *discriminates* against both writers and publishers of lesser stature.

For when the same price must be paid under the blanket license for the use on network television of Gershwin or Mancini, on the one hand, or for the product of some unknown composer, on the other hand, that unknown composer has a problem he would not face in a competitive market (*see* C33 (Stevens, J.)).

In short, while ASCAP and BMI have doubtless succeeded in masquerading in this case as champions of the "little writer," the reality is quite the reverse. In this market, the ASCAP/BMI system entrenches vested interests; it benefits only those who need no benefit; and benefits them, to the *disservice* of the "little writer" and of the public at large, by vastly inflating the price.

Conclusion

For the reasons stated above and in our petition, the petition for a writ of certiorari should be granted.[6]

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[6] We believe that the Department of Justice, if asked to participate on this petition, would support CBS's position. It did so in the court of appeals, albeit with obvious reluctance and only after being directed to file a brief and to take a position on oral argument. Its reluctance is to be understood in the light of the Department's having left in place for thirty years a decree that fails to deal with the problems which are highlighted by the position it advanced on remand and would again espouse, we believe, if directed to take a position.